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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974
No. 73-815

IRA COLEMAN ROBERTS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 497 S.W. 2d 666 and is reproduced at page 14 of the Petition.

JURISDICTION

Petitioner invokes the Court's jurisdiction under: "23 U.S.C. S 1257(3)." Assuming that the printing should have read 28 rather than 23 U.S.C. respondent is willing to stipulate that the jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether reference to a photograph of petitioner's alleged accomplice during trial in State Court violated Petitioner's constitutional right to due process of law.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V. to the United States Constitution.

STATEMENT

The petitioner was convicted of the crime of grand larceny for having stolen approximately $53,000.00 of currency from James and Charles Peacock, two (2) McCrory, Arkansas, farmers.

At trial the State showed the photograph of an alleged accomplice to several witnesses. The Peacocks' and their employee identified the photograph as that of "Bill Taylor," while two police officers identified the same photograph as that of "Marshall May Powell." Presumably the point to be made was that petitioner (identified by the Peacocks as "Doc Watson") and his accomplice used aliases in the commission of the crime.

No objection was made to the identification at trial. The photograph was not introduced into evidence.

The Supreme Court of Arkansas affirmed the conviction of petitioner, noting that the identifications were not prejudicial and that no objections were made to them during the trial. There is no indication that a Federal question was addressed to the Arkansas Supreme Court.

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT. NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED AT TRIAL, AND NO FEDERAL QUESTION WAS PRESENTED TO THE COURT BELOW.

Respondent would respectfully submit at the outset that the decision in the instant case in no way conflicts with any Federal statute or any decision by this or any other Federal Court. The opinion of the Court below did not address the "due process" argument which petitioner attempts to raise in his petition, but rather decided the question on separate and independent State grounds. Specifically, the Arkansas Supreme Court held that the use of the photograph of which petitioner complains was nonprejudicial and was not objected to at trial and that therefore no ground for reversal existed.[1]

Even if this Court should find that the "due process" issue was addressed below, nevertheless it is urged that no denial of due process is shown by petitioner.

Petitioner cites *Simmons v. U.S.*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967, for the proposition that this Court was ". . . concern[ed] for possible prejudice that could result from the use of a photograph . . ." and argues that: "The use of the photograph during the trial was certainly impermissibly suggestive of who the picture was of . . . ."

Simmons, supra, involved identification of suspects before trial by means of photographs which the govern-

[1]The trial transcript clearly reveals that objections were made only to the admissibility of the photograph, not to the identification of the accomplice.

ment refused to produce at trial. The photograph in question at present did not pretend to be that of petitioner and it was not used for pre-trial identification. Clearly, *Simmons* is not even remotely applicable to the issue presented here.

Petitioner's only other citation is to *U.S. v. McNamara*, 422 F. 2d 499. Petitioner apparently cites *McNamara* for the proposition that ". . . when the police are the ones who isolate or focus on a particular individual in a line-up or photographic identification case, an inference of guild (sic) arises."

Respondents urge that petitioner's interpretation of the *McNamara* holding is erroneous since that case dealt with a situation in which a witness identified one picture of a suspect and called for other photographs, which were provided. At any rate *McNamara, supra*, is no more applicable to the instant case than is *Simmons* and for exactly the same reasons.

Petitioner notes that he ". . . is not aware of any cases directly on these facts . . ." and respondent's research has uncovered none. No demonstration of prejudice has been made and the "due process" argument has not been elaborated upon.

On the basis of the foregoing, respondent argues that no substantial Federal question has been raised, that the decision below was based on independent grounds of state law and did not address a Federal due process question, that the decision by the Arkansas Supreme Court is clearly correct and does not conflict with any Federal case or statute or with the Constitution of the United States, that no Constitutional rights of petitioner were at any time violated and that therefore no basis has been presented for the granting of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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